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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-48

CECIL ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

Petitioners,

v.

GLOVER CONSTRUCTION COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION OF ARCTIC SLOPE REGIONAL CORPORATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

AND

BRIEF OF ARCTIC SLOPE REGIONAL CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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July, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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MOTION OF ARCTIC SLOPE REGIONAL CORPORATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Arctic Slope Regional Corporation respectfully moves this Court, pursuant to Rule 42 of the Supreme Court rules, for leave to file the attached brief as amicus curiae in support of the petition for a writ of certiorari in this case. The consent of the Solicitor General, on behalf of

the Petitioners, has been obtained. The consent of the attorney for the Respondent was requested but refused.

The interest of Arctic Slope Regional Corporation in this case arises from the fact that it is a corporation, created by Federal statute in return for the extinguishment of valid land claims to the whole of the North Slope of Alaska and owned by 3500 Alaskan Eskimos, that has wholly-owned subsidiary construction companies that are eligible for negotiated Federal construction projects under the preference given to Indians and other Natives by the Buy Indian Act, 25 U.S.C. Section 47 (1976). The decision of the court below in this case has eliminated the preference of the Buy Indian Act for road and other construction projects and will thereby adversely affect the ability of ASRC's construction subsidiaries, and their Native workers, to obtain Federal contracts. The parties below did not adequately present arguments regarding the effect of this decision on Indian-owned companies, the effect on Alaska native-owned companies in particular, or the unique importance of construction projects to the economic livelihood of Native residents of the State of Alaska. The significance of eliminatng the preference for construction projects to Native-owned construction corporations in Alaska should be reviewed by this Court in its consideration of this petition for writ of certiorari.

Respectfully submitted,

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BRIEF OF ARCTIC SLOPE REGIONAL CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Arctic Slope Regional Corporation respectfully tenders this brief as amicus curiae for the consideration of the Court in support of the petition for writ of certiorari in No. 79-48. Arctic Slope Regional Corporation supports the position presented therein and urges this Court to grant the writ of certiorari.

THE INTEREST OF ARCTIC SLOPE REGIONAL CORPORATION

Arctic Slope Regional Corporation (hereinafter ASRC) is one of thirteen Native regional corporations created and organized pursuant to the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. Section 16O1 et seq. (1976). The shareholders of the corporation are Native Eskimos who are, and have been for thousands of years, residents of the North Slope of Alaska. The initial assets of ASRC were the land and monetary transfers from the Federal government to those Native residents in settlement of their extensive claims to the lands of the North Slope, which includes the Prudhoe Bay oil reservoir which now provides 8.7 percent of the nation's domestic crude oil production. As a for-profit Native corporation organized pursuant to Federal statute under the laws of the State of Alaska, ASRC has a dual purpose: (1) to engage in profitable undertakings to benefit the Native shareholders of the corporation, and (2) to provide employment opportunities to Native shareholders and other residents of the North Slope of Alaska.

Because of the severe weather conditions in the Arctic, the geographic isolation, and the limited population of the North Slope, economic activity is seasonal and severely limited. The primary non-government opportunity for Native employment and work by local companies is in construction work, much of which is generated by oil and gas exploration and development at Prudhoe Bay and other regions of the North Slope.

ASRC has formed construction company subsidiaries that it intends to be ongoing profit-making business enterprises and that will train and employ the Native residents of the North Slope. These construction companies are eligible for and have sought to obtain Federal construction contracts negotiated pursuant to the Buy Indian Act, 25 U.S.C. Section 47 (1976). The preference for such contracts given to Native-owned companies by the Act offers significant opportunities for these new businesses to gain experience and generate revenues so that they can become viable economic entities.

The decision of the court below, 591 F.2d 554 (10th Cir. 1979), held that the Buy Indian Act preference could not be used by the Department of the Interior, through the Bureau of Indian Affairs (hereinafter BIA), for road construction projects; the lower court's interpretation would encompass other Federal construction projects throughout the United States, including Alaska. If allowed to stand, this decision would eliminate a valuable mechanism for developing the technical and financial ability of Native-owned construction companies in Alaska. The interests of Native construction companies, however, and in particular those of Alaska Natives, were not represented directly in the proceedings below. Therefore, ASRC has a clear interest in seeking reversal of the decision and in providing this Court with an additional perspective on the significance of this case.

REASONS FOR GRANTING THE WRIT

Congress and this Court have historically and consistently acknowledged the unique relationship between the Federal government and Indians, including Eskimos and other Alaska Natives. *Cherokee Nation* v. *Georgia,* 3O U.S. (5 Pet.) 1 (1831). Congress has enacted various statutes to encourage and assist the economic and social development of those groups.

The decision of the court below directly conflicts with those Congressional policies. Moreover, by requiring that all road construction contracts be subject to the advertis-

ing requirements of the Federal Property Act, 41 U.S.C. Section 252-253 (1976). The court below has dealt a serious setback to the efforts of Native-owned companies to secure a place in the economic structure of this country. That result is contrary to the national interest and is not required by the statutes that the court below erroneously interpreted.

A. The Buy Indian Act Implements the Long Standing Congressional Policy of Assisting Native Americans to Develop Economic Self-Sufficiency.

Congress has long recognized that Indians and Alaska natives are among the most disadvantaged citizens in the United States in all facets of life, including income and employment. See, *e.g.*, S. Rept. No. 92-405, 92nd Cong., 1st Sess., 71-72 (1971). Congress has passed numerous Federal statutes to aid indigenous Native people in improving their financial and social well-being. See, *e.g.*, the Snyder Act, 25 U.S.C. Section 13 (1976); the Indian Reorganization Act of 1934, 25 U.S.C. Section 461, et seq. (1976); the Indian Financing Act of 1974, 25 U.S.C. 1451, et seq. (1976); and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. Sections 450-450n, 455-458e (1976). This Court has, in reviewing such statutes, applied "that eminently sound and vital canon . . . that statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtfull expressions being resolved in favor of the Indians." *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976).

The Buy Indian Act was passed to enable the BIA's predecessor agency to negotiate with Indian tribes for the

purchase of the products of Indian industry as an exception to the general government policy of advertising and having open competition for government contracts for goods and services. Although the language of the Buy Indian Act is general, the Secretary of the Interior, through the Commissioner of Indian Affairs, has interpreted the Act as allowing negotiation with wholly-owned Indian firms on road and other construction contracts. 20 BIAM 1 (1976).

Applying the Buy Indian Act to construction projects is crucial for the Act to have any significant impact. Native groups often lack management experience and do not have a highly trained work force. Consequently, construction companies are often selected as initial business ventures; the level of skills in the Native work force is often most compatible with construction activities. Construction contracts also are generally large and can provide immediate sources of needed capital. Development of native-owned construction companies is even more significant in Alaska where traditional manufacturing and other business activities are not practical due to the long distance from major consumer areas of the lower 48 states and the high cost of doing business in Alaska. In the North Slope area of Alaska, construction associated with oil and gas exploration and development is a principal source of non-governmental jobs.

Much construction activity in the North Slope is funded by government contracts. Millions of dollars in Federal contracting funds have gone to Native-owned companies in Alaska pursuant to the Buy Indian Act. Because the opportunities for additional federal purchase from Native companies in the North Slope and other areas of Alaska are primarily construction related and because the range of other economic activities in the state is limited, the

decision of the court below will severely curtail the infusion of Federal dollars to the the business ventures of Alaska Natives. As described by Judge McKay in his dissent, 591 F.2d at 564-65, the lower court's interpretation of the statute will extend it only to the purchase of products manufactured by Indians, which are limited, and in the case of Alaska Natives of the North Slope, virtually nonexistent. The decision below, therefore, does not merely affect a small portion of the potential economic preference provided by the Buy Indian Act; because of the importance of construction companies to Native groups, the decision will significantly restrict contracting opportunities for Native businesses.

B. Congress Did Not Intend The General Advertising Requirement For Federal Contracts To Supercede The Preference Given For Negotiation Of Contracts With Native Americans.

The court below held that the Federal Property Act, which generally requires the advertising of federal contracts, identifies specific exceptions to the advertising requirements for construction projects. Because 41 U.S.C. Section 252(e)(B) does not reference the exception in 41 U.S.C. Section 252(c)(15), which authorizes negotiation of contracts where authorized by other laws, the court below found that Congress had not provided a statutory exclusion for construction contracts under the Buy Indian Act. The decision of the court below is in error for several reasons.

First, the decision is inconsistent with Congressional intent in passing the Buy Indian act which implemented the long standing Congressional policy, discussed *supra*, to provide significant economic and social programs for Native Americans. The validity of such preference statutes

was upheld by this Court in on *Morton* v. *Mancari*, 417 U.S. 535 (1974), which sustained the preference given to Natives for jobs in BIA.

Second, the decision conflicts with generally applicable rules of statutory construction. As Judge McKay, dissenting in the decision below, pointed out, the Buy Indian Act is special legislation designed to promote economic development and self-sufficiency of natives, whereas the provisions of the Federal Property Act apply to general Federal procurement. Both statutes could coexist if, as in *Morton* v. *Mancari, supra,* the Buy Indian Act were interpreted only as a narrow exemption on behalf of Indians from the general provisions calling for public advertising for bids on government construction contracts. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one regardless of the priority of enactment. *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758 (1961).

In addition, two statutes should be read to be consistent wherever possible. Courts have generally sustained Congressional mandates that shield disadvantaged firms from competition to enable them to gain managerial expertise. Even though certain contracts of the Small Business Administration are negotiated and not advertised pursuant to 41 U.S.C. Section 252 and 253, that policy was uphheld against a challenge similar to that filed by Respondent in *Ray Baillie Trash Hauling Inc.* v. *Kleppe*, 477 F.2d 696 (5th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974). The court in *Ray Baillie* found the exception in 41 U.S.C. Section 252(c)(1O), for situations where advertising is "impracticable", to apply in cases where statutes require preference to be given to disadvantaged groups. The court below ignored this exception to the advertising rule. Because that exception is specifically listed in Section 253(e)(B), the court below should have found it to justify

negotiation for construction contracts under the Buy Indian Act.

Finally, the court below ignored the language of the Federal Property Act and its legislative history. The Act did not even apply to the BIA until 1965 when Congress passed amendments that imposed its advertising requirements on all Federal agencies, not just the General Services Administration. But in doing so, Congress specifically provided that "this *chapter* does not apply - . . . (2) when this chapter is made inapplicable pursuant to . . . any other law." (emphasis added) 41 U.S.C. Section 252(a). Consequently, the restriction in Section 252(e) is not applicable where the Buy Indian Act preference is invoked by BIA. Congress was explicit in its intent not to disturb previously enacted exemptions to advertising requirements: "[T]he section makes clear that the limited exceptions specified . . . in any other law, are not eliminated by this section . . ." H. Rept. No. 1166, 84th Cong., 1st Sess., 7 (1965), as reprinted in [1965] U.S. Code Congressional and Administrative News, 4223. The position of the court below that the enactment of general advertising requirements evidenced an intent by Congress to overturn the longstanding specific preference to be given to Native workers and companies is simply without support.

CONCLUSION

For the foregoing reasons, Arctic Slope Regional Corporation as amicus curiae urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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